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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HAROLD BEELER J.S.C. PART 21

Index Number : 117950/2006
SEHNERT, BARBARA
VS.
NYCTA
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 117950/06

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

is denied as per attached decision and order.

FILED
DEC 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/24/09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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BARBARA SENHERT and MARVIN SEHNERT
Plaintiff,

-against-

Index No. 117950/2006
SEQUENCE MS002
DECISION & ORDER

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, CITY OF NEW YORK, BROADWAY TENTH PROPERTY LLC, and ERNEST REALTY ASSOCIATES LLC,
Defendants

BROADWAY TENTH PROPERTY LLC and ERNEST REALTY ASSOCIATES LLC,
Third-Party Plaintiffs,

-against-

34TH STREET PARKING CORP.,
Third-Party Defendants

----------X

HAROLD B. BEELER, J.S.C.:

Third-party plaintiffs Broadway Tenth Property and Ernest Realty Associates (collectively, "landlords") move for summary judgment against third-party defendants 34th Street Parking Corp. ("tenant"), for an order requiring tenant to defend and indemnify the landlords from plaintiff's claims. Tenant opposes the motion; the other parties have not taken a position. For the reasons discussed herein, the motion is denied.

Plaintiff Barbara Sehnert alleges that, immediately after disembarking from a bus owned and operated by defendants New York City Transit Authority and Metropolitan Transit Authority (collectively, "Transit Authority), she tripped and fell over a metal strip protruding from a public sidewalk on 34th Street and Tenth Avenue. The thin metal strip, a remnant of a sign post, was

embedded in the sidewalk approximately 16 inches from the street. In addition to suing Transit Authority and the City of New York, plaintiff sued landlords as the owners of the building at 435-445 Tenth Avenue adjacent to the sidewalk. Landlords brought a third-party action against tenant, who are the occupants of the building pursuant to a lease dated November 19, 1997.

Landlords argue that three paragraphs of the lease, individually and collectively, require tenants to indemnify landlords: 1) paragraph 8, headed "Tenant's Liability Insurance, Property Loss, Damage, Indemnity"; 2) paragraph 59, "Indemnity"; and 3) paragraph 4, "Repairs." Additionally, landlords argue that tenant owes a common law duty to indemnify landlord for plaintiff's injury.

An indemnification clause, like any other provision in a contract, is enforceable on a party's motion for summary judgment where the clause is clear and unambiguous on its face. *Omansky v. Whitacre*, 55 A.D.3d 373, 866 N.Y.S.2d 109 (1st Dept 2008). A clause requiring indemnification for a contractor's own negligence is unenforceable as a matter of law. N.Y. Gen. Obl. § 5-322-1. However, a clause requiring a subcontractor to indemnify a general contractor or owner for injury to a worker is enforceable, so long as the party to be indemnified is not negligent in producing the injury. *Id.*; *see Linarello v. City Univ. of N.Y.*, 6 A.D.3d 192, 194, 774 N.Y.S.2d 517, 519 (1st Dept 2004).

Two paragraphs explicitly require tenant to indemnify landlord.

Paragraph 8, which is headed "Tenant's Liability Insurance Property Loss, Damage, Indemnity," states:

> Owner or its agents shall not be liable for any damage to property of Tenant or others entrusted to employees of the building, nor for loss of or damage to any property of Tenant by theft or otherwise, nor for

any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner, its agents, servants or employees. Owner or its agents will not be liable for any such damage caused by other tenants or persons in, upon or about said building or caused by operations in construction of any private, public or quasi public work. *Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease.* Such insurance shall be in an amount and with carriers acceptable to the Owner. Such policy or policies shall be delivered to the Owner. On Tenant's default in obtaining or delivering any such policy or policies or failure to pay the charges therefor, Owner may secure or pay the charges for any such policy or policies and charge the Tenant as additional rent therefor. *Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant,* Tenant's agent, contractors employees, invitees, or licensees, of any covenant on condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees or licensees. Tenant's liability under this lease extends to the acts and omissions of any subtenant, and any agent, contractor, employee, invitee or licensee of any subtenant. In case any action or proceeding is brought against Owner by reason of such claim, Tenant, upon written notice from Owner, will, at Tenant's expense, resist or defend such action or proceeding by counsel approved by Owner in writing, such approval not to be unreasonably withheld. [Relevant portions italicized]

paragraph 59, which is headed "Indemnity," states:

Tenant shall indemnify and keep, save and hold harmless Landlord of and from any and all claims, losses, damages, expenses (including reasonable legal fees, whether incurred in defending claims of third parties or enforcing this indemnity), costs and liabilities (collectively, "Damages") for anything and everything whatsoever arising from or out of the use or occupancy by or under the Tenant or by or under the entity that occupied the demised premises prior to Tenant's

> occupancy of the demised premises (the "Prior Occupant"), the condition of the demised premises and the sidewalks adjacent thereto (or the appurtenances thereof) and the conduct of business thereon during the term of this lease or the occupancy of the Prior Occupant and any accident, injury or damage whatsoever caused to any part in (or about) the demised premises or sidewalks adjacent thereto (or the appurtenances thereof) during the term of this lease or the occupancy of the Prior Occupant (unless caused by the negligence of the willful misconduct of Landlord, its agents or employees), and from any Damages arising from any fault or negligence by Tenant or the Prior Occupant or their respective agents', employees', subtenants', and occupants' part to comply with any of the covenants, terms and conditions herein contained. [relevant portions italicized]
>
> Tenant shall, throughout the term of this Lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear expected...

Additionally, paragraph 44(b) requires that "All insurance to be maintained by Tenant shall be primary over any insurance Landlord elects to carry."

By its express terms, paragraph 8 requires tenant to indemnify landlords against plaintiff's personal injury claim, to the extent that either may be liable to plaintiff. Tenant, however argues that the qualifier "for which Owner shall not be reimbursed by insurance" means that tenant must only indemnify landlord for any remaining liability after plaintiff is compensated first through tenant's insurance and then by landlord's insurance. *See Diaz v. Lexington Exclusive Corp.*, 59 A.D. 341, 874 N.Y.S.2d 77 (1st Dept 2009).

Tenant's argument relies on *Diaz*, where the First Department construed a similar clause that tenant "shall indemnify and save harmless Owner against and from all liabilities...which Owner shall not be reimbursed by insurance." In *Diaz*, the owner, who had obtained its own

insurance, brought a third-party suit against tenants for contractual indemnification. The owner argued that the clause only relieved tenant from indemnification if tenant's own insurance fully covered liability. However, the First Department held that the words "reimbursed by insurance" did not refer to any party's specific coverage. Therefore, the tenant was relieved of its duty to indemnify because owner would be reimbursed by its own insurance. Accordingly, the First Department dismissed the third-party claim.

The clause in paragraph 8 is indistinguishable from that in *Diaz*, in that it requires indemnification "for which Owner shall not be reimbursed by insurance" without reference to any specific party's insurance. Landlords have their own insurance covering the subject area. Therefore, to the extent that owners are subject to liability, tenants are required to indemnify landlords the amount for which landlords will not be covered by tenant's primary insurance, and then by landlord's own insurance.

Landlord also relies on paragraph 4 of the lease, with the header "repairs":

> Tenant shall, throughout the term of this Lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear expected...

The lease does not define "non-structural repairs," or "structural repairs," and landlord offers no evidence regarding the parties' intent as to what the provision entailed. The clause is not unambiguous as a matter of law, and therefore the court will not enforce it on this motion for summary judgment.

In addition to the indemnification claims based on the express contract, landlords move

for summary judgment on its claim for common law indemnification. To establish a claim for common law indemnification, the party to be indemnified must demonstrate that it was not negligent, that its own liability to the injured party arises only from an obligation imposed by law, and that the party from whom indemnification is sought was negligent. *Correria v. Professional Data Mgmt., Inc.*, 259 A.D.2d 60, 64, 693 N.Y.S.2d 596 (1999). Unlike a claim for contractual indemnification, the purported indemnitee must demonstrate the other party's negligence. *Id.*

Landlords have not established that tenant was negligent as a matter of law. Generally, liability for a city sign post lies with the City, and not with the landlord or tenant. *See King v. Altom Prop. Inc.*, 16 Misc.3d 1125(A), 847 N.Y.S.2d 902 (Sup. Ct. Kings Co. 2007). Moreover, landlords have failed to demonstrate that tenant created the dangerous condition, or that tenant in any way contributed to the dangerous condition.

Accordingly, it is hereby ORDERED that third-party plaintiff Broadway Tenth Property LLC and Ernest Realty Associates' motion for summary judgment against third-party defendant 34th Street Parking Corp. is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
November 25, 2009

ENTER:

HAROLD B. BEELER, JSC
HAROLD BEELER
J.S.C.